

APPEAL NO. 160541

FILED JUNE 1, 2016

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 2, 2016, with the record closing on February 29, 2016, in Houston, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the fourth quarter, May 1 through July 30, 2015.

The appellant (carrier) appealed the hearing officer's determination, contending that the evidence is legally insufficient to support the hearing officer's determination. The carrier also contends that the hearing officer abused her discretion in sending a letter of clarification (LOC) to (Dr. KR), the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation to determine the claimant's ability to work, and relying on Dr. KR's opinion in making her determination. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Reversed and rendered.

The parties stipulated in part that the claimant sustained a compensable injury on (date of injury), that resulted in an impairment rating of 15% or higher. Medical records in evidence indicate the claimant was injured when a forklift ran over his left leg.

The carrier contends that the hearing officer abused her discretion in sending an LOC to Dr. KR, and that Dr. KR's LOC response should not have been admitted into evidence. To obtain a reversal of a judgment based on the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. *Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Appeals Panel Decision (APD) 043000, decided January 12, 2005; *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex.1986). Under the circumstances of this case, we hold the hearing officer's actions were not an abuse of discretion.

The claimant's theory of entitlement to SIBs for the fourth quarter is based on a total inability to work. The hearing officer found that during the qualifying period for the fourth quarter the claimant was unable to perform any type of work in any capacity, and noted in her discussion that Dr. KR's report in response to the LOC is sufficient evidence of a total inability to work, and that his unemployment was a direct result of his compensable injury. Medical records in evidence list the claimant's position as a pipefitter.

28 TEX. ADMIN. CODE § 130.102(d)(1) (Rule 130.102(d)(1)) provides, in pertinent part, that an injured employee demonstrates an active effort to obtain employment by meeting at least one or any combination of the following work search requirements each week during the entire qualifying period:

(E) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

In APD 012286, decided November 14, 2001, the Appeals Panel "held that the narrative report from the doctor must specifically explain how the compensable injury causes a total inability to work." See *a/so* APD 032173, decided October 9, 2003, and APD 111188, decided October 10, 2011.

Dr. KR noted in her February 15, 2016, LOC response that she had reviewed the provided medical records, which indicated a subsequent worsening of the claimant's condition which necessitated further treatment. Dr. KR opined that:

Given the severity of [the claimant's] injuries from the forklift accident, along with compromised tissues from a previous motorcycle accident, it is not surprising that the claimant's wounds, though closed at the time of my [d]esignated [d]octor [e]xamination, would have further problems healing, requiring the noted treatment. Although I placed him back to work with restrictions based on my examination of [December 1, 2014], and the [functional capacity evaluation (FCE)] performed on [December 9, 2014], his change in clinical condition by [January 8, 2015], requiring debridement and continuing to further treatment, should supersede my previous determination of return to work status.

Based on medical information provided, it is my opinion that the claimant's medical condition worsened enough during the identified qualifying period

. . . to have his work status listed as off work due to non-healing wounds that required extensive and serial treatment.

Although Dr. KR's report states that the claimant's work status is listed as off work, it does not state that the claimant has a total inability to work. None of the medical reports in evidence constitute a narrative report from a doctor which specifically explains how the compensable injury caused a total inability to work in any capacity. Accordingly, we reverse the hearing officer's determination that the claimant is entitled to SIBs for the fourth quarter, May 1 through July 30, 2015, and we render a new decision that the claimant is not entitled to SIBs for the fourth quarter, May 1 through July 30, 2015.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RICHARD GERGASKO, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.**

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge